apportioned "among all the attaching entities." The Commission correctly concludes in the NPRM that unless the utility provides communication services, the utility should not be considered to be an attaching entity for purposes of apportioning unusable space costs. This is consistent with the Section 224 (a) definition of "pole attachment" as being an attachment by a cable television system or a provider of telecommunication service. The utility's attachment of its electric facilities to a pole or conduit does not fall within that definition. In addition, Section 224(e)(2) implicitly apportions one third of the unusable space costs to the utility. An allocation of unusable space costs beyond this one-third share would be inconsistent with this provision.

2. *Allocation to Incumbent Local Exchange Carrier*

NYEU disagree with the NPRM's conclusion that the incumbent LEC with attachments on a pole should be counted as a separate entity for the purpose of apportioning unusable space costs. The incumbent LECs should be excluded from this calculation. Section 224(a) (4) defines the term "pole attachment" to be any attachment by a cable television system or a provider of telecommunication service. Section 224(a) (5) explicitly states that "the term 'telecommunications carrier'. . . does not include any incumbent local exchange carrier." Consequently, LEC's are not attaching entities, and should not be allocated the costs of the two-thirds portion of unusable space.

3. *Allocation to Governmental Agencies*

NYEU also disagree with the NPRM's proposal that governmental agencies be considered as attaching entities for purposes of apportioning unusable costs. Section 224(e)(2) states that unusable costs will be allocated "among all attaching entities." Under section 224 (a)(4), only cable television systems and telecommunications service providers are attaching entities for purposes of Section 224. Thus, governmental agencies, that are not providing "telecommunications services," are not "attaching entities" and should not be apportioned unusable costs.

Governmental agency attachments to utility poles generally do not produce revenue for the utility because the utility's franchise agreement usually precludes charges for such attachments. If governmental attachments were allocated unusable space costs, those charges could not be recovered and would have to be absorbed by the utility. Thus, allocation of a unusable space share to governmental agencies would further increase beyond the one third level the portion of unusable space costs that the utility would have to absorb – a result that has no support in Section 224.

The NPRM takes the position that because a governmental agency's right to use a pole is granted by franchise the utility should have to absorb this cost. We disagree. The government's right to use a pole ought to be viewed as element of the utility's cost for obtaining its pole plant, and, like the cost of obtaining an easement, should be included in the costs of pole ownership to which all attaching entities contribute by way of attachment rates.

4. Apportionment of Unusable Space Costs

NYEU disagree with the NPRM's proposal that, for purposes of apportioning unusable space costs, a telecommunications carrier will be counted as a separate attaching party for each foot, or partial increment of a foot, of space it occupies on a pole. This approach would be inconsistent with section 224(e)(2) which provides that there be an "equal apportionment of [unusable space] costs among all attaching entities." All attaching entities benefit equally from the unusable space portions of the pole they occupy.

For example, each entity is equally dependent on the support provided by the underground section of the pole. An equal apportionment of unusable space costs recognizes that these benefits are enjoyed equally by all attaching entities.

5. *Presumptive Number of Attachments*

NYEU support the use of a presumptive average number of attachers to a pole. A pole-by-pole inventory of the number of entities on each pole would be impractical and too costly. The Commission's rules should allow each utility to develop its own presumptive average based on multi-utility (either regional or statewide) utility data. The presumptive average should be updated annually by the utility. NYEU oppose the use of separate presumptive averages for urban, suburban, and rural areas. The Commission's goals of simplicity and ease of administration are better served by use of a single presumptive number for each utility that would reflect the customer density of that utility.

VI. Allocating the Cost of Usable Space

The NPRM requests comments on the allocation of the cost of usable space required for each entity. The Commission's current presumption that span wire attachments use one foot of usable space remains appropriate for span wire attachments that occupy no more than one foot of usable space. However, where the attachment occupies more than one foot of space on the pole, the attaching party should be billed in multiples of the attachment rate based on the number of feet or fraction of a foot that the attachment occupies. For example, if an attachment occupies 2½ feet of space, the attacher's charge would be three times the single attachment rate. This approach is reasonable because there is limited usable space on a pole, and an oversized attachment prevents other parties from using the pole and would otherwise reduce the owner's attachment revenues.

VII. Use of Utility Easements by Attaching Entities

ILEC right-of-way acquisition costs are already reflected in the ILEC's pole investment account and, therefore, are apportioned and reflected in the current pole attachment rate method. Because electric right-of-way costs are not reflected in the electric pole investment accounts, these costs are not reflected in electric pole attachment rates. Electric utilities should also be permitted to include these same costs in pole attachment rates.

In order to provide electric service electrical service via overhead pole line routes, electric utilities have entered into easement agreements with property owners granting the right to construct, operate and maintain lines and poles. The specific language of each easement varies. Some contain narrow language dealing only with the provision of electricity; others contain broader language.

In the leading case in New York, Hoffman v. Capital Cablevision System, 52 A.D.2d 313(3d Dep't), motion for leave to appeal denied, 40 N.Y.2d 806 (1976), the court determined that utility company easements rights are apportionable to cable operators even though the scope of the easement may not specifically include CATV facilities.

Apportioning the rights granted in existing utility easements has been acknowledged by the courts as the most economically feasible and least environmentally damaging way of installing cable [telecommunications] systems. Prohibiting cable and telecommunications companies from using such easements until compensation is paid to the landowners or until condemnation proceedings are instituted would greatly increase the cost to these companies and possibly deny the public the benefits of telecommunications competition.

These easement rights are apportioned to attaching entities via the pole attachment licensing process. NYEU believes that the cost of obtaining these rights should be shared among the pole occupants by including these costs as an adder to pole investment account. The FCC should allow utilities to use a rebuttable presumption (derived from utility data) reflecting a cost per pole or a percentage of the land rights account.

NYEU's proposal is supported by the NYPSC's order in Case 26494, Opinion 83-4, issued January 31, 1983, establishing rules guidelines for developing CATV pole attachment rates. Included in the order's listings of pole line investments which are useful to CATV are Privileges for Construction.

NYEU accumulate the cost of obtaining these "privileges" in a land rights account. Since overhead distribution rights-of-way costs are not already incorporated in the pole investment account, a separate cost must be added to the pole investment account if electric right-of-way acquisition costs are to be reflected in pole attachment rates.. Such an approach would be consistent with other separate adjustments being proposed in response to the FCC's Pole Attachment Notice issued March 14, 1997.

Rights-of-way acquisition costs incurred by the owners of pole structures benefit all non-pole owners who are licensed to attach to the pole. NYEU believe that these costs should be included in pole attachment fees for attachers that provide only CATV service as well as telecommunications carriers.

VIII. Implementation

The NPRM requests comments on its proposal that the increase for the telecommunications rate be phased in over five years beginning on February 8, 2001 and that one-fifth of the increase be added to the rate in each of the subsequent five years. It is not clear to NYEU how the phase-in would be implemented. NYEU believes that the phase-in should be implemented as follows:

(1) Both the new FCC and the current FCC pole attachment rates be calculated each year for the first four years of this phase-in period.

(2) In the first year, 1/5th of the difference between these rates would be added to the current FCC Rate to determine the billing rate.

(3) In the second year, 2/5ths of the difference would be added to the current FCC rate to determine the billing rate.

(4) This method would continue with 3/5ths in the third year and 4/5ths in the fourth year.

(5) The full amount of the new FCC rate would be the billing rate in the fifth and subsequent years.

The following is an example of how this rate would be calculated:

	2001	2002	2003	2004	2005
Current FCC Rate	$ 10.00	$10.50	$10.80	$11.00	$11.20
New FCC Rate	$16.00	$16.30	$16.80	$17.30	$17.50
Billing Rate	$11.20	$12.82	$14.40	$16.04	$17.50

The billing rate is calculated by adding 1/5, 2/5, 3/5 and 4/5 of the difference between the current FCC and the new FCC rates calculated each year to the current FCC rate. In the year 2005, the full amount of the new FCC rate would be billed.

IX. Conclusion

For the reasons set forth herein, the Commission should adopt rules and policies for the implement the telecommunications attachment rate consistent with the concerns and proposals stated in these comments.

Dated: September 25, 1997

Respectfully submitted,

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Central Hudson Gas & Electric Corporation

Long Island Lighting Company,

New York State Electric & Gas Corporation;

Niagara Mohawk Power Corporation;

Orange and Rockland Utilities, Inc.;

Rochester Gas and Electric Corporation

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